IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UPONOR, INC.	§	
	§	
Plaintiff	§	
	§	
vs.	§	CASE NO. 07-2986
	§	
UNIQUE INDUSTRIAL PRODUCT COMPANY	§	
	§	
	§	
Defendant	§	

PLAINTIFF'S ORIGINAL COMPLAINT

NOW COMES Plaintiff UPONOR, INC. (hereinafter "UPONOR") and files this original complaint against Defendant UNIQUE INDUSTRIAL PRODUCT COMPANY (hereinafter "UNIQUE") and respectfully shows as follows:

PARTIES

1. At all times relevant, Plaintiff UPONOR was and is a Minnesota Corporation, with its principal place of business located at 5925 148th Street West, Apple Valley, Minnesota. Therefore, UPONOR was and is both a citizen and a resident of Minnesota. UPONOR is engaged in the business of supplying/distributing various plumbing products including, among other products, brass plumbing fittings as well as toilet swivel nuts, and was authorized to conduct business in Texas.

2. Upon information and belief, at all times relevant, Defendant UNIQUE was and is a Texas corporation with its principal place of business located at 4023 Westhollow Parkway, Houston, Texas, and was acting as a domestic agent, apparent manufacturer, importer, supplier/distributor and marketer of plumbing products

including, among other products, ASTM F1807 brass plumbing fittings and polyacetyl toilet swivel nuts. At all times relevant, UNIQUE was doing business in the State of Texas, and was both a citizen and a resident of Texas.

JURISDICTION AND VENUE

3. This Court has original jurisdiction of this action pursuant to 28 U.S.C. Section 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs.

4. Venue is proper in this jurisdictional district pursuant to 28 U.S.C. Section 1391(a)(2) and (f)(1) as UNIQUE is doing business in this jurisdictional district.

PRELIMINARY ALLEGATIONS

5. In the fall of 2004, UPONOR purchased from UNIQUE polyacetyl toilet swivel nuts, ("Swivel Nuts") with the intent and understanding that those Swivel Nuts would be further distributed by UPONOR to wholesalers for installation in residential plumbing systems. UPONOR's purchases of the Swivel Nuts were pursuant to purchase orders which were governed by UPONOR's standard Purchasing Terms and Conditions. A copy of UPONOR's standard Purchasing Terms and Conditions is attached hereto as Exhibit "A."

6. During and after the discussions/negotiations relating to the sale of the Swivel Nuts, UNIQUE understood that UPONOR would be acting as an intermediate distributor of the Swivel Nuts and would be passing that product along to wholesalers and end users without any changes to the product.

7. Pursuant to Paragraph 11 of the Terms and Conditions applicable to the purchase orders pertaining to the Swivel Nuts ("Swivel Nut PO"), UNIQUE agreed to

indemnify UPONOR and "hold and save [UPONOR] from and against any and all claims, demands, liabilities, losses or expenses of whatsoever in kind and nature which [UPONOR] shall or may at any time sustain or incur by reason of, in consequence of, or arising out of the manufacture, sale or delivery by [UNIQUE] of the goods and/or services described in this Purchase Order." See Exhibit "A".

8. During and after the discussions/negotiations relating to the sale of the Swivel Nuts, UNIQUE presented itself to UPONOR as knowledgeable regarding that product, represented that it was in the business of selling such products, and UPONOR relied on UNIQUE's experience and knowledge relating to the Swivel Nuts. Further, UNIQUE agreed to provide goods that were free from defects in workmanship, materials, or design, and which were merchantable and fit for their intended purpose of incorporation into residential plumbing systems.

9. Pursuant to Paragraph 31 (Warranty Specifications) of the Terms and Conditions relating to the Swivel Nut PO, UNIQUE further "expressly warrant[ed] that all goods and/or services, and workmanship with respect to the goods, covered by the Purchase Order ... will be in exact accordance with such Purchase Order, description, drawings, specifications or samples and free from defects in design (except to the extent such defective design is attributable to [UPONOR]), materials and workmanship and will be merchantable and fit for a particular purpose(s)." See Exhibit "A".

10. Pursuant to the Swivel Nut POs and the applicable Terms and Conditions, UNIQUE began shipping the subject Swivel Nuts to UPONOR.

11. Prior to the date on which UPONOR began purchasing the Swivel Nuts from UNIQUE, UPONOR entered into separate agreements with various wholesalers to

supply them with Swivel Nuts which would then be sold to plumbers as well as builders/contractors and installed into residences throughout the United States. Subsequent to the date of UNIQUE's sale of the Swivel Nuts to UPONOR, and in accordance with its agreements with these various wholesalers, UPONOR supplied UNIQUE's Swivel Nuts to the wholesalers. UPONOR made no changes or alterations to UNIQUE's Swivel Nuts and simply re-distributed UNIQUE's product in the same condition in which it was supplied by UNIQUE.

12. Subsequent to UPONOR's distribution of the UNIQUE Swivel Nuts to wholesalers, UPONOR received notice from a builder/contractor, Palm Harbor, that certain of the Swivel Nuts were failing during and after installation in residences.

13. At various times, including but not limited to, the fall of 2004 and thereafter, UPONOR purchased from UNIQUE, pursuant to multiple purchase orders (the "Fitting POs"), ASTM F1807 brass plumbing fittings ("Fittings") with the intent and understanding that those Fittings would be further distributed by UPONOR to wholesalers for installation in residential plumbing systems. Sample copies of UPONOR Fitting Purchase Orders ("Fitting POs") issued to UNIQUE are attached hereto as Exhibit "B." The Fitting POs were also subject to UPONOR's standard Purchasing Terms and Conditions attached hereto as Exhibit "A." UPONOR did not spec the Fittings but rather ordered them from UNIQUE "off the shelf."

14. During and after the discussions/negotiations relating to the sale of the Fittings, UNIQUE understood that UPONOR would be acting as an intermediate distributor of the Fittings and would be passing that product along to wholesalers and end users without any changes to the product.

15. During and after the discussions/negotiations relating to the sale of the Fittings, UNIQUE presented itself to UPONOR as knowledgeable regarding that product, represented that it was in the business of selling such products, and UPONOR relied on UNIQUE's experience and knowledge relating to the Fittings. Further, UNIQUE agreed to provide goods that were free from defects in workmanship, materials, or design, and which were merchantable and fit for their intended purpose of incorporation into residential plumbing systems.

16. Prior to the date on which UPONOR purchased the Fittings from UNIQUE, UPONOR entered into separate agreements with various wholesalers to supply them with the Fittings, which would then be sold to plumbers as well as builders/contractors and installed into residences throughout the United States. Subsequent to the date of UNIQUE's sale of the Fittings to UPONOR, and in accordance with UPONOR's agreements with various wholesalers, UPONOR supplied UNIQUE's Fittings to the wholesalers. UPONOR made no changes or alterations to UNIQUE's Fittings and simply re-distributed UNIQUE's product in the same condition in which it was supplied by UNIQUE.

17. Pursuant to Paragraph 11 of the Terms and Conditions applicable to the Fitting POs, UNIQUE agreed to indemnify UPONOR and "hold and save [UPONOR] from and against any and all claims, demands, liabilities, losses or expenses of whatsoever in kind and nature which [UPONOR] shall or may at any time sustain or incur by reason of, in consequence of, or arising out of the manufacture, sale or delivery by [UNIQUE] of the goods and/or services described in this Purchase Order."

18. Pursuant to Paragraph 31 (Warranty Specifications) of the Terms and

Conditions for the Fitting POs, UNIQUE further "expressly warrant[ed] that all goods and/or services, and workmanship with respect to the goods, covered by the Purchase Order or other description, drawings, specifications or samples furnished by [UNIQUE] ... will be in exact accordance with such Purchase Order, description, drawings, specifications or samples and free from defects in design (except to the extent such defective design is attributable to [UPONOR]), materials and workmanship and will be merchantable and fit for a particular purpose(s)."

19. Pursuant to the Fitting POs, UNIQUE began shipping Fittings by the spring of 2005.

20. Prior to the date that UPONOR began purchasing the Fittings from UNIQUE, UPONOR entered into separate agreements with various wholesalers to supply them with the Fittings, which would then be sold to plumbers as well as builders/contractors and installed into residences throughout the United States. Subsequent to the date of the Fittings purchases by UPONOR and in accordance with its agreements with various wholesalers, UPONOR supplied UNIQUE's Fittings to the wholesalers for installation in residential plumbing systems.

21. Thereafter, in June and August of 2006, Palm Harbor informed UPONOR of multiple Swivel Nut failures, demanded reimbursement from UPONOR for the damages it claims as a result of the defective Swivel Nuts and also demanded replacement of all UNIQUE Swivel Nuts contained in the approximately 5,000 homes in which UNIQUE's Swivel Nuts had been installed.

22. In and after April of 2006, UPONOR began receiving notices of failures of certain Fittings supplied by UNIQUE which had been incorporated into plumbing

systems in various residential properties, which failures resulted in water damage.

23. In August of 2006, UPONOR contacted various wholesalers regarding the failures of the Fittings and Swivel Nuts that UNIQUE sold to UPONOR, and, as a result of the failures, the Fittings and Swivel Nuts were removed from the wholesalers' inventory and returned to UPONOR.

24. From in or about December of 2006 through May of 2007, one of the end users of UNIQUE's Fittings, a builder named NVR, discovered that UNIQUE's Fittings installed in residences constructed by NVR were failing.

25. From January of 2007 through May of 2007, NVR claimed to have incurred hundreds of thousands of dollars worth of damages resulting from the Fittings' failures. These damages related to the costs and expenses associated with the removal and replacement of the Fittings installed in select residences in Virginia. UPONOR paid the damages claimed by NVR and has presented a claim to UNIQUE pursuant to the terms of the Standard Terms and Conditions governing the Fitting POs, for reimbursement of the sums that UPONOR has paid as a result of the failure of UNIQUE's Fittings. UNIQUE has failed to make reimbursement to UPONOR for any of these sums.

26. UPONOR has tendered all known manufacturing defect related claims to UNIQUE relative to costs that it has incurred thus far and/or will incur as a result of the defective Fittings and Swivel Nuts that UNIQUE sold to UPONOR.

27. Renewing its demands for reimbursement made in June and August of 2006, Palm Harbor, during the period of November 2006 through July 2007 once again demanded that UPONOR pay for all costs and expenses associated with the removal and

replacement of Swivel Nuts installed in approximately 5,000 homes throughout the United States. UPONOR, in turn, presented a claim to UNIQUE pursuant to the Standard Terms and Conditions governing the Swivel Nuts POs for the sums being sought by Palm Harbor. UNIQUE has failed to honor and pay UPONOR's claim.

28. To date, UPONOR has received hundreds of thousands of dollars worth of additional claims relating to Fittings and Swivel Nuts failures, over $200,000.00 of which have been paid directly by UPONOR despite the fact that UPONOR is an innocent seller which made no alterations or modifications to the products supplied by UNIQUE.

29. Since mid-2006, UPONOR has sought, with no success, reimbursement and/or tendered claims to UNIQUE relative to Fitting and Swivel Nut failures pursuant to the Terms and Conditions of the Fitting and Swivel Nuts Purchase Orders.

30. UNIQUE has failed to accept any claims and/or to reimburse UPONOR for payments made relative to Fittings and Swivel Nut failures.

31. At present, UPONOR has sustained damages in the form of honoring warranty claims, related costs and expenses incurred as a result of defects and deficiencies in UNIQUE products, as well as the complained of acts and/or omissions of UNIQUE. In addition, UPONOR may lose future business and profits from various wholesalers as a result of the deficiencies in the Fittings and Swivel Nuts.

COUNT I

(Breach of Contract)

32. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Original Complaint as though fully set forth herein. Pursuant to the language of the Standard Terms and Conditions governing the Purchase Orders involved, UNIQUE

agreed to manufacture and/or supply UPONOR with Fittings and Swivel Nuts which were fit for their intended purpose and reasonable for consumer installations.

33. Further, as domestic agent for a foreign manufacturer of the products at issue, and as a distributor of the products involved in this matter, UNIQUE held itself out as being knowledgeable, skilled and competent in the business of manufacturing and supplying Fittings and Swivel Nuts and represented that the Fittings and Swivel Nuts would be manufactured in a good and workmanlike manner, and fit for their intended purpose.

34. Pursuant to the Standard Terms and Conditions governing the purchase orders, UNIQUE agreed to indemnify UPONOR in connection with any claims or demands arising out of the products supplied to UPONOR by UNIQUE.

35. UNIQUE breached its agreement with UPONOR in one or more of the following respects because UNIQUE:

a) defectively manufactured the subject Fittings and Swivel Nuts;

b) failed to take reasonable steps to ensure that the Fittings would not be subject or prone to fracturing post-manufacture in expected and intended residential use;

c) failed to take reasonable steps to ensure that the Swivel Nuts would not be subject or prone to fracturing post-manufacture in expected and intended residential use;

d) failed to properly test, inspect and evaluate the Fittings and Swivel Nuts prior to distributing those products to determine that they were suitable and fit for installation in residential plumbing systems;

e) supplied UPONOR with Swivel Nuts and Fittings that were not merchantable, or suited for their reasonable, expected and intended use in residential plumbing systems, and which were not free from defects in materials, design and workmanship;

f) failed, despite repeated demands by UPONOR, to indemnify UPONOR for the costs and expenses incurred in connection with failures of products supplied by UNIQUE to UPONOR, which products have been injected into the stream of commerce by UNIQUE; and

g) otherwise breached the Agreement with UPONOR.

36. At all times relevant, UPONOR fulfilled all obligations and/or responsibilities that it had and which arose out of the aforementioned Standard Terms and Conditions to which the Purchase Orders for the products at issue were subject.

37. As a direct and proximate result of the aforementioned breaches of the Agreements by UNIQUE, UPONOR has sustained damages within the jurisdictional limits of this Court.

COUNT II

(*Breach of Express Warranty of Merchantability*)

38. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. Under the Terms and Conditions governing the Fitting and Swivel Nuts Purchase Orders, UNIQUE warranted that the design and the manufacture of the subject Fittings and Swivel Nuts were in accordance with recognized and sound engineering principles and that those products were in a good and merchantable condition such that the Fittings and Swivel Nuts were reasonably fit for the ordinary purposes for which they were intended to be used.

39. The subject Fittings supplied by UNQIUE were not in a good and merchantable condition upon receipt by UPONOR since they were susceptible to failure due to fracturing from various causes including poor microstructure and pre-existing cracks.

40. As a direct and proximate result of the aforementioned breach of express warranty by UNIQUE, UPONOR sustained damages.

COUNT III

(Breach of Implied Warranty of Merchantability)

41. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. At all times relevant, and in accordance with the provisions of Section 2.314(a) of the Texas Business and Commerce Code, UNIQUE, as the apparent manufacturer of the goods/products at issue, and being a merchant/seller with respect to those products/goods, impliedly warranted that the design and manufacture of the subject Fittings and Swivel Nuts was done in a fashion that left those products in a good and merchantable condition so that the Fittings and Swivel Nuts were reasonably fit for the ordinary purposes for which they were intended and would pass without objection in the trade.

42. The subject Fittings and Swivel Nuts supplied by UNIQUE were not in a good and merchantable condition when they were supplied to UPONOR, were not fit for the ordinary purposes for which such goods are used, and would not pass without objection in the trade as evidenced by multiple failures of the goods when put to their ordinary and intended uses.

43. UPONOR duly and reasonably relied on the skill and judgment of UNIQUE as the apparent manufacturer of the goods, as a merchant/seller of the goods and as a marketer of the goods, in connection with the design, manufacture and supply of the Fittings and Swivel Nuts which were to be merchantable when supplied to UPONOR.

44. As a direct and proximate result of the aforementioned breach of implied

warranty by UNIQUE, UPONOR has sustained damages.

COUNT IV

(Breach of Implied Warranty of Fitness for a Particular Purpose)

45. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. At all times relevant, and in accordance with the relevant provisions of Section 2.315 of the Texas Business and Commercial Code, UNIQUE was a seller/merchant with respect to the goods at issue, had reason to know of the particular purpose for which the goods were needed, and had reason to know that UPONOR was relying on UNIQUE's skill or judgment to select or furnish suitable goods, thereby giving an implied warranty that the subject Fittings and Swivel Nuts were fit for their particular purpose and/or use and that the Fittings and Swivel Nuts were suitable to be incorporation into residential plumbing systems under expected and anticipated conditions.

46. Notwithstanding the foregoing warranty, the Fittings supplied by UNIQUE were not fit for their particular purpose or use as they experienced multiple failures for various reasons including, but not limited to, their poor microstructure and pre-existing cracks.

47. The Swivel Nuts supplied by UNIQUE were not fit for the particular purpose or use as they experienced multiple failures characterized by fracturing.

48. UPONOR duly and reasonably relied on the skill and judgment of UNIQUE, as the apparent manufacturer, seller and marketer of the goods, to supply Fittings and Swivel Nuts which were fit for their intended and particular purpose and use.

49. As a direct and proximate result of the unfit condition of the subject

Fittings and Swivel Nuts, multiple failures of those products occurred, causing damage to UPONOR.

COUNT V

(Common Law Indemnity)

50. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. UNIQUE was the apparent manufacturer of the Fittings and Swivel Nuts involved in this matter and so held itself out to companies in the market for such products, including UPONOR.

51. On information and belief, UNIQUE was the importer, distributor and marketer of the Fittings and Swivel Nuts involved in this matter, and UNIQUE was the entity that placed the Fittings and Swivel Nuts into the stream of commerce causing UPONOR to sustain damages when those products failed.

52. UPONOR made no changes or alterations to the Fittings and Swivel Nuts at issue in this matter, and was an innocent retailer in the chain of distribution of the Fittings and Swivel Nuts.

53. As a result of multiple failures of the Fittings and Swivel Nuts, claims for damages have been made and directed to UPONOR as a "down stream" participant in the chain of distribution of the goods at issue. Notwithstanding its role as an innocent retailer in the chain of distribution, UPONOR has incurred expenses in connection with such claims including, but not limited to, payment of property damage claims due to the failure of the UNIQUE products.

54. UPONOR has made demand upon UNIQUE for reimbursement of sums spent in connection with these claims and UNIQUE has failed to honor UPONOR's

demand.

55. As a result of their relative positions in connection with the manufacture, sale and distribution of the products at issue, UPONOR is entitled to be indemnified by UNIQUE for damages it has incurred as a result of the failures of Fittings and Swivel Nuts placed into the stream of commerce by UNIQUE.

COUNT VI

(Breach of Express Indemnity)

56. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. Under the terms of the Fittings and Swivel Nuts Purchase Orders, and the Standard Terms and Conditions that governed those Purchase Orders, UNIQUE agreed to indemnify UPONOR for any and all claims, liabilities, losses or expenses arising out of the sale of the Fittings and Swivel Nuts.

57. UPONOR sold the Fittings and Swivel Nuts to various wholesalers, and as a result of the failure of those products, UPONOR has received claims, and has incurred liabilities, losses, costs and expenses.

58. Pursuant to the indemnity provision referred to above, UPONOR tendered all claims, liabilities, losses, costs and expenses to UNIQUE.

59. To date, UNIQUE has failed and refused to reimburse UPONOR, resulting in UPONOR sustaining damages.

COUNT VII

(Strict Products Liability – Defective Product)

60. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. At all times relevant, UNIQUE was engaged

in the business of selling, marketing, and distributing the Fittings and Swivel Nuts involved in this matter, and it was expected that the Fittings and Swivel Nuts would reach the ultimate user or consumer without substantial change in the condition in which those products were sold. The Fittings and Swivel Nuts sold, marketed and distributed by UNIQUE did reach the ultimate user or consumer in the condition in which those products were sold by UNIQUE.

61. The Fittings and Swivel Nuts involved in this matter were defective and unreasonably dangerous at the time they were sold by UNIQUE as the construction and quality of the fittings and swivel nuts deviated from the specifications and/or planned output of those products in various ways including, but not limited to, poor micro-structures and preexisting cracks in the Fittings and preexisting cracks and excessive porosity in the Swivel Nuts, rendering both types of products unreasonably dangerous. These defects existed at the time the Fittings and Swivel Nuts left the possession of UNIQUE and caused UPONOR to sustain damages as a result of the failures of the Fittings and Swivel Nuts.

62. As a direct and proximate result of the defective and unreasonably dangerous condition of the Fittings and Swivel Nuts, those products failed, causing water damage to residences following the installation of those products as part of the residential plumbing systems.

63. As a direct and proximate result of the defective and unreasonably dangerous condition of the Fittings and Swivel Nuts, multiple failures of those products occurred, causing UPONOR to sustain damages, and UPONOR will continue to sustain damages in the future.

COUNT VIII

(*Negligence*)

64. UPONOR re-alleges and incorporates Paragraphs 1 through 31 of the Complaint as though fully set forth herein. UNIQUE, as the apparent manufacturer, seller, distributor and marketer of the products involved in this matter owed a duty to UPONOR to provide it with products that were merchantable, fit for their intended and foreseeable purposes/uses and which were manufactured in accordance with reasonable and recognized industry standards.

65. UNIQUE breached its duty to UPONOR in connection with the Fittings and Swivel Nuts it sold to UPONOR in one or more of the following ways:

> b) defectively manufactured the subject Fittings and Swivel Nuts in various ways including, but not limited to, creating the presence of poor microstructure and cracks;
>
> b) distributed/sold Fittings and Swivel Nuts which were cracked, structurally unsound, not fit for ordinary use in residential plumbing system, and which were not fit for their intended purposes;
>
> c) failed to take reasonable steps to ensure that the Fittings would not be subject or prone to fracturing post manufacture in expected and intended residential use;
>
> d) failed to take reasonable steps to ensure that the Swivel Nuts would not be subject or prone to fracturing post manufacture in expected and intended residential use;
>
> e) failed to properly test, inspect and evaluate the Fittings and Swivel Nuts prior to distributing those products to determine that they were suitable and fit for installation in residential plumbing systems.
>
> f) continued to distribute/sell Swivel Nuts and Fittings that were not suitable for their reasonable, expected and intended use in residential plumbing systems after it knew or in the exercise of reasonable care should have know of the deficiencies or defects in

those products; and

g) otherwise acted in a careless and negligent fashion in connection with the distribution and sale of the Fittings and Swivel Nuts.

66. As a direct and proximate result of the negligent acts and omissions of UNIQUE with respect to the Fittings and Swivel Nuts, those products failed, causing water damage to residences following the installation of those products as part of residential plumbing systems.

67. As a direct and proximate result of the negligent acts and omissions of UNIQUE, which have caused or contributed to the multiple failures of the products involved in this matter, UPONOR has sustained damages and will continue to sustain damages in the future.

PRAYER FOR RELIEF

68. WHEREFORE, Plaintiff UPONOR, INC. respectfully requests that Defendant be cited to appear and that this Court enter judgment for Plaintiff and against Defendant UNIQUE INDUSTRIAL PRODUCT COMPANY in an amount to be determined by the trier of fact, together with interest, costs, and attorney's fees. Plaintiff also respectfully requests any other and further relief as the Court deems just and equitable to which Plaintiff may be entitled.

Respectfully submitted,

SHANNON, GRACEY, RATLIFF & MILLER, L.L.P.

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